No. 14-1096

In the Supreme Court of the United States

JORGE LUNA TORRES,

Petitioner,

v.

LORETTA E. LYNCH,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government concedes (BIO 16-18) that the lower courts are in conflict on the question presented. The government errs, however, in calling the conflict "nascent" (BIO 18), a mistake caused by the government's failure to mention four of the seven circuits involved. On the merits, the government persists (BIO 9-16) in a non-literal interpretation of the statute under which "described in" somehow means "described in, except for one of the elements." The Court should grant certiorari and reverse.

I. This 6-1 circuit conflict warrants immediate review.

As our certiorari petition explained, seven circuits have addressed the Question Presented: Whether a state offense constitutes an aggravated felony under 8 U.S.C. § 1101(a)(43), on the ground that the state offense is "described in" a specified federal statute, where the federal statute includes an interstate commerce element that the state offense lacks. Six of the seven have mistakenly answered yes, on the theory that Congress must have intended something other than what the statute actually says. Pet. App. 1a-14a; *Espinal-Andrades v. Holder*, 777 F.3d 163 (4th Cir. 2015), *pet. for cert. pending*, No. 14-1268 (filed Apr. 22, 2015); *Nieto Hernandez v. Holder*, 592 F.3d 681 (5th Cir. 2009); *Negrete-Rodriguez v. Mukasey*, 518 F.3d 497 (7th Cir. 2008); *Spacek v. Holder*, 688 F.3d 536 (8th Cir. 2012); *United States v. Castillo-Rivera*, 244 F.3d 1020 (9th Cir. 2001), *cert. denied*, 534 U.S. 931 (2001). Only the Third Cir-

cuit has read the statute literally and answered no. *Bautista v. Attorney Gen.*, 744 F.3d 54 (3d Cir. 2014).

The Brief in Opposition does not even mention the earliest four of these cases, from the Fifth, Seventh, Eighth, and Ninth Circuits. These cases involved state offenses other than arson, but the Question Presented is the same for any state offense, because it would be impossible for "described in" to have different meanings for different state offenses. The Third Circuit's *Bautista* decision was not, as the government would have it (BIO 16), "the first appellate decision addressing the issue." It was the fifth. The conflict on the Question Presented did not begin "in recent months" with the decision below (BIO 17). It began in February 2014 with *Bautista*, in which the Third Circuit explicitly "decline[d] to apply our sister circuits' reasoning." *Id.* at 66. *Bautista* created a 4-1 conflict among the circuits. Now the tally is up to 6-1, because the Second and Fourth Circuits have both explicitly rejected *Bautista*. Pet. App. 3a, 9a; *Espinal-Andrades*, 777 F.3d at 168 n.2.

There is nothing "nascent" about this conflict; it is fully developed and ready for review. The issue has been thoroughly litigated in seven circuits and in the Board of Immigration Appeals, which has come out both ways. Pet. 4-7. There is nothing left to be said on either side. It is particularly ironic that the government should assert that "the Third Circuit has not yet had the opportunity to consider en banc review" (BIO 19), as the government was the losing party in *Bautista* yet did not seek en banc review.

The issue is very important. The definition of "aggravated felony" is one of the most frequently-litigated provisions of immigration law, because so many significant consequences—including deportation, eligibility for asylum, and eligibility for cancellation of removal—turn on whether a particular offense is an aggravated felony. Pet. 2. Nearly half the offenses listed in the long statutory definition of "aggravated felony" include the phrase "described in." This issue affects a large number of people.

The conflicts between contiguous circuits make forum-shopping practically inevitable. Non-citizens can enter the country in the Third Circuit rather than the Second or the Fourth simply by flying into Newark rather than JFK and Philadelphia rather than Baltimore. By moving to New Jersey or Pennsylvania, some lawful permanent residents can render themselves nonremovable. Likewise, the government can choose to detain non-citizens outside the Third Circuit so they will be deemed aggravated felons. This conflict will have real consequences until the Court puts it to rest.

II. The government's non-literal interpretation of the statute is no more persuasive than ever.

The government has defended a non-literal reading of the statute for several years—before the BIA, in seven circuits, and now in its Brief in Opposition in this case. The argument has not improved with age. After all these years, the government has still not pointed to a single instance, either in the U.S. Code or in ordinary English usage, in which "de-

scribed in" means "described in except for one element," or "similar to what is described in." Nor does the government even bother to address the other textual arguments in the certiorari petition, except to make the remarkable claim (BIO 16) that Congress's use of a phrase in one statute does not suggest that Congress could also have used the phrase in another statute.

Instead, the government clings to the last resort of the anti-textualist—the contention that a literal reading of the statute would create "absurdities" (BIO 12), "disparities" (BIO 13), and "absurd consequences" (BIO 13-14). Despite the government's repeated use of the plural, the Brief in Opposition identifies only one ostensible absurdity or disparity, the fact that the statute defines federal arsons but not most state arsons as aggravated felonies. But this is no absurdity at all. Minor arson offenses are normally prosecuted by the states, not by the federal government. It would hardly have been absurd for Congress to exclude such minor arsons from the definition of aggravated felony. To be sure, some state arsons are more serious, and occasional federal arsons may be minor. But the question is not whether Congress designed a perfect mechanism for separating major from minor arsons. The question is whether a literal reading of the statute would be too absurd to contemplate. It would not.

Nor can the government's non-literal reading be rescued by supposing (BIO 15-16) that "arson" would have been too vague a word for Congress to use if it really wanted to include arson as an aggravated felony. The government imagines (BIO 15) that the def-

inition of arson varies so widely among jurisdictions that the word is now too ambiguous to use in federal statutes. In fact, however, the word "arson" appears several times in the U.S. Code without confusing anyone. *See, e.g.*, 15 U.S.C. § 2220(1) (directing the Federal Emergency Management Agency to develop "arson control techniques"); 18 U.S.C. § 1111(a) (defining first degree murder to include murder committed during "any arson"); 18 U.S.C. § 3559(c)(2)(B) (defining arson for sentencing purposes). When Congress wants to say "arson," it says "arson."

Moreover, the supposed ambiguity of generic names for crimes did not stop Congress from using other generic names for crimes in the definition of aggravated felony, including "murder" and "rape," 8 U.S.C. § 1101(a)(43)(A), as well as "theft" and "burglary," § 1101(a)(43)(G). If Congress had wanted to classify all state arsons as aggravated felonies, as it did for these other crimes, it would have used the word "arson."

But Congress did not say "arson." Instead, Congress said "an offense described in" 18 U.S.C. § 844(i), a statute that "is not soundly read to make virtually every arson in the country a federal offense," *Jones v. United States*, 529 U.S. 848, 859 (2000), because it prohibits the burning only of property "used in interstate or foreign commerce." A court cannot ignore Congress's choice of words, even if the court believes a contrary choice would have been more sensible.

Finally, the government's invocation of *Chevron* deference (BIO 14) is doubly mistaken—first because

the text of the statute is not ambiguous, and second because the statute has both civil and criminal applications. *See, e.g.*, 8 U.S.C. § 1326(b)(2) (providing enhanced criminal penalties for reentry by an alien convicted of an "aggravated felony"). Indeed, if the text of the statute were ambiguous, it would have to be interpreted in George Luna's favor under the rule of lenity. *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) ("Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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